

**REPORT OF CONSULTANT TO THE CITY
OF BELLEVUE CONCERNING CONFLICT
OF INTEREST ALLEGATIONS AGAINST
COUNCILMEMBER KEVIN WALLACE**



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We are pleased to submit to the City of Bellevue (the “City”) our final report relating to the conflict of interest allegations made against Councilmember Kevin Wallace. This is our third and last report concerning the conflict of interest allegations made against three members of the Bellevue City Council (the “Council”). On May 16, 2011, we submitted an interim report (the “Interim Report”) concerning our investigation into allegations that the three members of the Council — Claudia Balducci, Grant Degginger, and Kevin Wallace — had or have conflicts of interest potentially impacting their consideration of issues relating to Sound Transit’s East Link light rail project. In the Interim Report, as directed by the Council on April 18, 2011, we summarized the conflict of interest allegations that had been made against the three Councilmembers and set forth our conclusions as to which allegations warranted further investigation, legal analysis, or both. The Interim Report also included our findings and conclusions concerning the allegations against Councilmember Claudia Balducci. On June 5, 2011 we submitted a second report containing our findings and conclusions with respect to the allegations against Councilmember Grant Degginger. On June 30, 2011, we submitted a status report to update the City on the progress of our investigation into the conflict of interest allegations concerning Councilmember Wallace.

We have now completed our investigation of the conflict of interest allegations against Councilmember Kevin Wallace. Our findings and conclusions are set forth in this Report. For the reasons discussed below, and based on the evidence available to us, it is our opinion that Councilmember Wallace has not violated any applicable provision of law by his participation in decisions and discussions concerning Sound Transit’s East Link light rail project as a member of the Council.

I. Scope Of Allegations Investigated

In the Interim Report, we stated that we had been informed of allegations that Councilmember Wallace had a conflict of interest concerning the East Link light rail project based on (1) his status as an officer of Wallace Properties, Inc., a commercial real estate company that manages several properties in downtown Bellevue that are beneficially owned by Councilmember Wallace’s parents, and some of which might be affected by various proposed East Link light rail alignments and station locations; and (2) Councilmember Wallace’s involvement with GNP Rly. Inc. (“GNP”), a company that has expressed a desire to operate a freight and/or commuter rail service along a rail line that is commonly referred to as the BNSF Eastside Rail Corridor (the “Corridor,” or the “ERC”).

Based on our preliminary review of those allegations, we determined that we would conduct a factual investigation to determine whether Councilmember Wallace’s involvement with GNP resulted in an impermissible conflict of interest under state or local law. We also determined that we would conduct a “peer review” of the January 2010 ethics opinion prepared for Councilmember Wallace by City Attorney Lori Riordan concerning whether Councilmember Wallace’s involvement with Wallace Properties would give rise to a conflict of interest with respect to the Council’s discussions and

votes concerning the Council's preferred alignment for the East Link project through downtown Bellevue. Although we stated in our Interim Report that we did not anticipate that any factual investigation would be necessary to conduct this peer review, in the course of our factual investigation on other points, we learned additional facts relevant to our analysis of issues addressed in the City Attorney's January 2010 opinion, and we have addressed those additional facts in this Report.

Our investigation ultimately focused on three primary issues with respect to the conflict of interest allegations against Councilmember Wallace: (1) whether Councilmember Wallace's participation in Council discussions and votes concerning potential routes for the downtown segment of the East Link light rail project that would potentially impact properties in which Councilmember Wallace's parents have beneficial ownership interests violated any applicable provision of state or local law; (2) whether Councilmember Wallace's advocacy of the proposed B7 or "B7 Revised" alignments for the East Link light rail project while he was simultaneously discussing a potential business deal with GNP violated any applicable provision of state or local law; and (3) whether Councilmember Wallace improperly used or attempted to use City resources for the benefit of GNP or himself.

II. Summary Of Factual Investigation

In the course of our factual investigation regarding the conflict of interest allegations against Councilmember Wallace, we interviewed five witnesses. On May 18, 2011, we interviewed Douglas Engle, a 50% shareholder and former CFO of GNP. On May 19, 2011, we interviewed Thomas Payne, a 50% shareholder and CEO of GNP. On July 6, 2011 we interviewed William Popp, Sr., a transportation consultant who submitted a proposal to the Bellevue City Council in September 2010 to study the feasibility of the proposed B7 Revised alignment for the East Link light rail project. On July 8, 2011, we interviewed Thomas M. Jones, a transportation consultant who contracted with, and provided services for, GNP. On July 14, 2011, we interviewed Councilmember Wallace.

We also reviewed approximately 10,878 documents (consisting of emails and attachments from Councilmember Wallace's City email account) provided to us on May 26, 2011 by the City of Bellevue, as well as the January 2010 ethics opinion prepared by the City Attorney for Councilmember Wallace.

On May 13, 2011, we requested that Councilmember Wallace produce to us all documents in his possession concerning a number of topics relevant to the subjects of our investigation. Councilmember Wallace and his counsel voluntarily cooperated with our requests, and Councilmember Wallace produced documents to us on four separate dates (June 22, 2011, June 28, 2011, July 13, 2011, and July 15, 2011) totaling 2,382 pages. Councilmember Wallace represented to us that he gathered documents in response to our requests by, with the assistance and guidance of counsel, reviewing potentially relevant hard copy documents in his files, engaging in a combination of manual review and keyword searches of his Wallace Properties email account, and reviewing potentially

relevant City Council documents and other publicly available documents. Councilmember Wallace stated to us that he believed he had identified and produced all documents in his possession responsive to our requests, as well as additional documents that he believed were relevant to the issues at hand. In addition, on July 12, 2011, Councilmember Wallace executed an attestation declaring that he had made a full, complete, true, and accurate response to our document requests. Upon thoroughly reviewing Councilmember Wallace's document production, we are satisfied with his compliance with our document requests as well as his cooperation in submitting to our interviews. Although we were not able to gather documents ourselves from, or apply forensic techniques to, Councilmember Wallace's hard copy and electronic files, we have no reason to believe that we received other than a full and complete response to our document request.

We also reviewed numerous other publicly available documents, including documents filed with the Surface Transportation Board concerning GNP's application to reinstate rail service on a portion of the BNSF Corridor known as the "Redmond Spur," documents filed with the United States Bankruptcy Court for the Western District of Washington in connection with an involuntary bankruptcy petition filed against GNP, minutes of, and documents relating to, Bellevue City Council meetings from the years 2009, 2010, and 2011, and a variety of publicly available documents relating to Sound Transit's East Link light rail project.

III. Applicable Legal Standards

The City does not have a dedicated local ethics code that applies to the Councilmembers.¹ Chapter 3.92 of the Bellevue City Code, adopted in 1989 and titled "Code of Ethics — City Council and City Boards, Commissions and Committees," recites that the business of the Council should be conducted in accordance with "high ethical standards" and adopts by reference the provisions of RCW Chapters 42.22 and 42.23. RCW Chapter 42.22 was repealed in 1994. RCW Chapter 42.23 contains two primary provisions that govern the conduct of municipal officers — RCW 42.23.030 and RCW 42.23.070.

RCW 42.23.030 prohibits a municipal officer from being "beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his or her office," and from accepting "directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein." Washington courts have interpreted the term "beneficial interest" in RCW 42.23.030 to be limited to financial interests. *See Barry v. Johns*, 82 Wn. App. 865, 868, 920 P.2d 222 (1996) ("We conclude . . . that RCW 42.23.030 applies only to municipal

¹ There have been calls from some people for adoption of a City ethics code that would apply to members of the Council. The City does have an ethics code that applies to City employees. *See* Bellevue City Code Ch. 3.90. The analysis in this Report is, however, based only on existing provisions of law applicable to members of the Council.

contracts involving business transactions, employment matters and other financial interests . . .”).

RCW 42.23.070 prohibits a municipal officer from (1) using his or her position to “secure special privileges or exemptions for himself, herself, or others” (RCW 42.23.070(1)); (2) giving or receiving any compensation, gift, reward, or gratuity for a matter connected with his or her duties (RCW 42.23.070(2)); (3) engaging in any business or professional activity that the officer might reasonably expect would induce him or her to disclose confidential information acquired by reason of his or her official position (RCW 42.23.070(3)); or (4) disclosing confidential information acquired by reason of his or her official position or using such information for his or her personal gain or benefit (RCW 42.23.070(4)).

With regard to the meaning of the phrase “special privileges or exemptions” in RCW 42.23.070(1),² one Washington authority suggests that the phrase is meant to prevent an officer from using his office to give himself or another person a privilege or exemption not authorized by law, or from giving a person preferential access to government resources or facilities without adequate justification. *See* AGO 2010 No. 3, at 9 (“A special privilege or exemption is a privilege or exemption to which the person is not legally entitled. A special privilege involves being allowed to do something that would otherwise be prohibited, while a special exemption involves being relieved from doing something that would be otherwise mandated. A special privilege may arise if an organization or corporation is granted preferential access to state agency facilities or employees without adequate justification for that preference.”) (internal citation and footnote omitted).³ We are not aware of any Washington authority that has construed RCW 42.23.070(1) in the context of legislative policy decisions. Clearly, however, RCW 42.23.070(1) cannot be interpreted to apply to prohibit all Council policymaking decisions that might benefit some identifiable person or entity in some way, because policy decisions by their very nature tend to benefit certain people and not others.⁴

² The Florida Supreme Court has noted that this language is not a model of clarity, and it has ruled that a state ethics statute using that exact phrase was unconstitutionally vague. *See State v. Rou*, 366 So.2d 385, 385 (Fla. 1978) (“The statute is unconstitutionally vague and leaves its enforcement to the whims of prosecutors. It does not convey[] a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. The terms ‘special privileges or exemptions’ afford one no guidelines, no ascertainable standard of guilt, no barometer by which a public official may measure his specific conduct.”) (internal citations and quotation marks omitted).

³ *Cf. Hubbard v. Spokane County*, 146 Wn.2d 699, 703-04, 711-13, 50 P.3d 602 (2002) (suggesting that RCW 42.23.070(1) would prohibit alleged decision to issue building permit in violation of zoning code); *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 867, 72 P.3d 741 (2003) (allegation that official directed that provisions of building code not be applied to particular party legally sufficient to allege violation of RCW 42.23.070(1)).

⁴ *See Rou*, 366 So.2d at 385-86 (“In this instance, a penalty is sought to be imposed against the accused County Commissioner by virtue of his having placed a public road contiguous to certain private property resulting in improvement to the owner of said property. It is a customary duty of County Commissioners to make determinations relating to construction of new roads and improvement of old ones. In making such determinations certain private owners are benefited instead of others. To say that such decisions are criminal in nature is incredible and justifies the conclusion of many highly qualified citizens to refuse to serve in public office.”).

Accordingly, we believe that a violation of RCW 42.23.070(1) in the context of a legislative policy decision would require, at a minimum, a showing that the official specifically intended for his actions to create a special benefit for himself or another person. *See Recall Charges Against Feetham*, 149 Wn.2d at 866-70 (finding alleged violations of RCW 42.23.070(1) factually and legally sufficient where allegations, if true, showed that official intended to break the law and confer special benefits; finding additional alleged violation of RCW 42.23.070(1) insufficient where party “did not provide specific facts to support its conclusions that Feetham *was attempting to secure a special privilege to himself*”) (emphasis added).

IV. Findings And Legal Conclusions

A. Councilmember Wallace Did Not Violate RCW 42.23.070(1) By Participating In The Council’s Consideration Of Proposed East Link Alignments Through Downtown Bellevue.

Shortly after Councilmember Wallace joined the Council, he requested that the City Attorney provide him with an opinion about whether his advocacy for a light rail alignment called the “Vision Line” created a conflict of interest that would require him to recuse himself from the Council’s actions concerning potential alignments for the East Link light rail project through downtown Bellevue based on the facts that (1) Councilmember Wallace’s parents hold beneficial ownership interests in a number of properties in downtown Bellevue that could be affected by the chosen alignment through downtown Bellevue (the “Wallace-owned properties”),⁵ and (2) the company for which Councilmember Wallace works, Wallace Properties, Inc. (“Wallace Properties”), manages certain of those properties and also represents a number of other property owners in downtown Bellevue.

In January 2010, the City Attorney issued a memorandum in response to Councilmember Wallace’s request.⁶ In addition to the facts set forth above, the City Attorney noted that a number of the proposed alignments through downtown Bellevue, including the Vision Line advocated by Councilmember Wallace even before he was elected to the Council, would likely require Sound Transit to acquire properties in which Councilmember Wallace’s parents hold a beneficial interest, and that other properties in which Councilmember Wallace’s parents hold a beneficial interest might benefit from their proximity to downtown station locations contemplated by a number of the proposed alignments.

⁵ Throughout this Report, we use the term “Wallace-owned properties” as shorthand to refer to the downtown Bellevue properties in which Councilmember Wallace’s parents hold some beneficial ownership interest. The use of that phrase is not intended to suggest that Councilmember Wallace has any personal ownership interest in those properties.

⁶ The City Attorney’s memorandum to Councilmember Wallace is dated January 5, 2010, but documents that we have reviewed indicate that the memorandum was not finalized until mid-January.

The City Attorney found that, based on the facts of which she was aware, Councilmember Wallace did not have a conflict of interest that would require him to recuse himself from the Council's East Link discussions and votes. The City Attorney noted that Sound Transit, not the City of Bellevue, has the ultimate responsibility for determining the alignment of the East Link light rail project through Bellevue, and that a reasonable person could well conclude that Sound Transit's taking of any Wallace-owned property would be a detriment, not a benefit, to the owners and to Wallace Properties. The City Attorney concluded that the mere possibility that Sound Transit might locate light rail facilities on or near Wallace-owned properties was too attenuated to support any conclusion that Councilmember Wallace's advocacy before the Council for consideration of the Vision Line would constitute the use of his position to secure a special privilege or exemption.

1. Relevant Facts

For purposes of our review of the City Attorney's January 2010 ethics opinion, we have assumed the truth of, and did not independently investigate or confirm, the facts as set out in the City Attorney's opinion. We did not, however, discover any information during the course of our investigation that caused us to question the accuracy of any of the facts set out in the City Attorney's January 2010 ethics opinion. As noted above, in the course of investigating the other conflict of interest allegations made against Councilmember Wallace, we did identify several additional documents containing information that we believe is relevant to this issue. We have considered those documents, along with some additional background facts, in our analysis below.

Well before his election to the Bellevue City Council, Mr. Wallace was a vocal participant in the Bellevue light rail debate, in part based on his involvement with the Bellevue Chamber of Commerce and the Bellevue Downtown Association. Mr. Wallace told us that he first reviewed Sound Transit's December 2008 Draft Environmental Impact Statement (the "DEIS") for the East Link project in his capacity as chair of the Bellevue Chamber of Commerce's transportation committee. After reviewing the DEIS, Mr. Wallace felt that there were some "clear winners" among the proposed alignments through Bellevue, and he believed that he was in a good position to advocate for a route that was good for Bellevue.

Documents produced to us by Mr. Wallace suggest that in early 2009, shortly after Sound Transit released the DEIS and before he was elected to the Council, Mr. Wallace's light-rail advocacy was also driven, at least in part, by the desire to protect Wallace Properties' interests in connection with the light rail alignment through downtown Bellevue. For example, in January 2009, Mr. Wallace sent an email to his father, Robert Wallace, that included the following statement: "Given the threats posed to our properties in Bellevue by Sound Transit I think we need to retain experienced counsel on behalf of Washington Park and WSLP to assist with the review of the DEIS, preparation of a comment letter and consideration of legal strategies for dealing with the light rail alignments." Similarly, in a February 2009 email to a third-party (on which Mr. Wallace was copied) concerning light rail, Robert Wallace stated:

We have been working on this issue aggressively, in fact Kevin Wallace has been spending about half time trying to lobby the BDA, Chamber and City Council to support routes that are less detrimental to our properties. One proposed route would run an elevated line in front of the Wallace/Scott 112th Buildings, and if you reflect on the negative impact of the Seattle Monorail on 5th Avenue properties, it is easy to understand our concern. But, even more worrisome, are the proposals to cross the freeway on NE 12th — those routes all propose to run right through Washington Park, destroying both buildings. Were they to do that, we'd likely ultimately get fair compensation for the taking, but in the interim, we would suffer great difficulty in retaining tenants and releasing vacant space if tenants know of the risk of demolition.

Accordingly, we have banded together with others similarly threatened to form coalitions and fund studies which we hope will cause the elected officials to embrace routes that are not damaging to us. Just last night, the Bellevue council embraced routes that would tunnel under downtown Bellevue (missing our 112th properties completely) and cross the freeway at NE 6th, sparing Washington Park. This was a great victory, because several of the planners were pushing for the 12th street crossing.

In our interview with Councilmember Wallace, he stated his priorities for the light rail alignment in Bellevue have always been to keep the rail line off the roads and away from traffic and to minimize impacts, including visual impacts and noise, to Bellevue neighborhoods and businesses. He stated that protecting the interests of Wallace Properties was never his primary motivation in his advocacy efforts concerning light rail.

In early 2009, Mr. Wallace publicly supported proposed alignments B7 and C2T through Bellevue. The C2T alignment, if selected, would have avoided negative impacts to Wallace-owned properties in downtown Bellevue. Mr. Wallace's position in favor of the C2T alignment was shared by the Bellevue Chamber of Commerce, and the Bellevue City Council also expressed its support for the C2T alignment in February 2009.

By late summer 2009, Mr. Wallace had begun to develop and advocate the Vision Line, a proposed alignment that generally followed the B7 alignment along the BNSF Corridor and then skirted downtown Bellevue, running along 114th Avenue NE just west of I-405. Mr. Wallace secured a small amount of private funding to have ARUP North America Ltd. conduct a preliminary study of the Vision Line (the downtown segment of which was later labeled C14E by Sound Transit; the C14E alignment is essentially the same as the Vision Line alignment), and Mr. Wallace publicly announced the details concerning the alignment of the proposed Vision Line in November 2009, shortly after he was elected to the Bellevue City Council.

In his interview with us, Councilmember Wallace stated that his advocacy of the Vision Line was not based on any attempt to benefit Wallace Properties, and he stated

that he does not recall ever even having a conversation with Robert Wallace or with any of the other partners with interests in the Wallace-owned properties in downtown Bellevue about how the Vision Line would impact those properties. He also stated that he understood the Vision Line would actually negatively affect Wallace-owned properties because it would run the track right over one of the properties and would require a partial or complete taking of that property. Councilmember Wallace's view that the Vision Line alignment would be detrimental to a Wallace-owned property was expressed in emails he wrote in February and March, 2010, as noted below.

Shortly after Councilmember Wallace joined the Council, members of the public raised allegations that Councilmember Wallace's advocacy of the Vision Line was motivated by the desire to benefit his company's or his family's property interests. As noted above, in January 2010, Councilmember Wallace received an ethics opinion from the City Attorney, in which the City Attorney concluded that Councilmember Wallace's advocacy of the Vision Line did not create an impermissible conflict of interest.

In two separate emails to constituents about the conflict of interest allegations in February and March 2010 (after he received the City Attorney's January 2010 opinion), Councilmember Wallace asserted that the Vision Line would, in fact, have the most negative impact on Wallace-owned properties of any of the potential downtown alignments then under consideration because it would potentially result in a taking of part or all of one of the properties. In those emails, Councilmember Wallace also stated that, by contrast to the proposed Vision Line, a number of the other proposed downtown alignments then under consideration would put a downtown Bellevue station relatively close to some Wallace-owned properties without negatively impacting the properties. In the February 2010 constituent email, Councilmember Wallace observed that the C9T, one of the proposed tunnel alignments through downtown Bellevue, would likely be the most favorable of the proposed alignments for Wallace-owned properties, because it would put a station very close to some of the properties. During our interview with Councilmember Wallace, he acknowledged that he agreed with the assumption that a property's proximity to a light rail station in downtown Bellevue could create a benefit to the property.

In Council meetings on March 15 and March 22, 2010, the Bellevue City Council expressed its unanimous support for the C9T alignment in downtown Bellevue. In his interview with us, Councilmember Wallace stated that his decision to support the C9T alignment in March 2010 was motivated by the desire to have a unified Council position on the C segment, which he believed would carry more weight and give the City more leverage with Sound Transit. The minutes of the March 22, 2010 Council meeting confirm Councilmember Wallace's statement to us. The minutes note that:

Councilmember Wallace reminded the Council that the C9T is not his favorite route due to concerns about the costs. He feels that the C14E alternative is less expensive and avoids a number of impacts. However, he is hopeful that the Council can come together and that everyone can make concessions on this letter. In this spirit of cooperation, he is supporting the letter even though he does not fully support the C9T alternative.

In our interview, Councilmember Wallace also stated that Wallace Properties's interests were not at all a part of his motivation for supporting the C9T as the Council's preferred position, and that he did not consider station proximity or other benefits to Wallace-owned properties in making any votes concerning the Council's preferred alignment through downtown Bellevue.

2. Legal Analysis And Conclusions

Based on our consideration of the above facts and the City Attorney's January 2010 ethics opinion, we conclude that Councilmember Wallace has not violated RCW 42.23.030 or 42.23.070 in connection with the Council's consideration of East Link alignments through downtown Bellevue.

As the City Attorney explained in her January 2010 ethics opinion to Councilmember Wallace, the only relevant provision of state law that appears to be potentially implicated here is RCW 42.23.070(1), which prohibits a municipal officer from using his or her position to "secure special privileges or exemptions for himself, herself, or others." The facts do not implicate any beneficial interest in a city contract, and so RCW 42.23.030 does not apply. Nor do the above facts suggest that Councilmember Wallace gave or received a compensation, gift, reward, or gratuity for a matter connected with his official duties, or that he used, disclosed, or engaged in any activity that might reasonably be expected to induce him to disclose, any confidential information acquired by reason of his official position. Accordingly, RCW 42.23.070(2)-(4) also do not apply. As previously discussed, the City does not have an ethics code that applies to members of the Council, so there are no other provisions of local law that apply here.

As noted above, we believe that insofar as RCW 42.23.070(1) applies to municipal legislative policymaking actions, a municipal officer violates RCW 42.23.070(1) only if he takes some action with the specific intention that the action will create a special benefit for himself or another person. Under that standard, Councilmember Wallace would not be prohibited by the statute from participating in Council advocacy or decisionmaking with respect to proposed downtown alignments for the East Link light rail project solely by virtue of the fact that the various alignments might affect the value of one or more Wallace-owned properties. Rather, Councilmember Wallace would violate the statute only if his actions as a member of the Council were motivated by an intent to benefit Wallace-owned properties or some other personal interest. Thus, the fact that Councilmember Wallace participated in Council actions relating to various proposed alignments for light rail through downtown Bellevue that would have different degrees of positive or negative impacts on Wallace-owned properties is not, by itself, evidence that Councilmember Wallace violated section 42.23.070(1).

The evidence we have reviewed does not show that Councilmember Wallace took any action with respect to the Council's consideration of light rail alignments in

downtown Bellevue with the specific intention of benefiting Wallace-owned properties. Although the facts discussed above indicate that (1) prior to his 2009 run for City Council, Mr. Wallace was, in fact, advocating for and against proposed light rail alignments based on their potential effects on Wallace-owned properties; and (2) Councilmember Wallace ultimately supported the C9T alignment after acknowledging that C9T was likely the most favorable downtown alignment for Wallace-owned properties, we do not believe that the evidence supports the conclusion that Councilmember Wallace's actions on the Council concerning the downtown light rail alignment were taken with the specific intent to benefit or protect Wallace Properties' interests.

Prior to stating his support for the C9T alignment in March 2010, Councilmember Wallace had long been advocating the proposed Vision Line. As the City Attorney noted in her January 2010 ethics opinion, and as Councilmember Wallace himself stated both to us and in February and March 2010 emails to constituents, the Vision Line alignment developed and advocated by Councilmember Wallace, at least as it was understood in 2010, has more negative impacts on Wallace-owned properties than the other proposed alignments that were under consideration by the Council in early 2010, as it would run an elevated track through, and potentially require a partial or complete taking of, a Wallace-owned property. Councilmember Wallace's longstanding and very public support of the Vision Line, including after he was elected to the Council, strongly suggests that Councilmember Wallace was not acting to advance his own or his family's private interests with respect to the Council's consideration of light rail routes through downtown Bellevue.

In addition, we have seen no affirmative evidence to suggest that Councilmember Wallace's later support for the C9T route was actually given with the intention of benefiting Wallace-owned properties. A majority of the Council supported the C9T route even without Councilmember Wallace's support, so it appears that C9T would have become the Council's preferred alignment irrespective of any position taken by Councilmember Wallace. Moreover, we find Councilmember Wallace's explanation that he decided to support the C9T alignment as the City's preferred alignment in order to achieve unanimity and maximum impact on Sound Transit (the entity charged with making the ultimate routing decision) to be credible and, as noted above, Councilmember Wallace's explanation is consistent with, and supported by, his contemporaneous public statements at the March 22, 2010 Council meeting.

Finally, shortly after he was elected to the Council, Councilmember Wallace sought and received an ethics opinion from the City Attorney concerning whether he was required to recuse himself from the Council's consideration of downtown light rail alignments. Although Councilmember Wallace's receipt of an ethics opinion is not dispositive and could not cure or excuse any actual violation of RCW 42.23.070(1), we believe that his actions in seeking an ethics opinion are relevant because they tend to show that Councilmember Wallace acted in good faith and thus lacked the intent necessary for any violation of RCW 42.23.070. The City Attorney's opinion took into account the possibility that certain light rail alignments through downtown Bellevue

might benefit Wallace-owned properties more than other alignments, and the City Attorney opined that Councilmember Wallace was not required to recuse himself from Council discussions about proposed downtown Bellevue East Link alignments.⁷

Accordingly, we agree with the conclusions in the City Attorney's January 2010 ethics opinion, and we also conclude that based on the facts available to us concerning Councilmember Wallace's advocacy concerning downtown light rail alignments and his parents' property ownership in downtown Bellevue, Councilmember Wallace did not violate RCW 42.23.070(1).

B. Councilmember Wallace Did Not Violate RCW 42.23.070 In Connection With His Relationship With GNP.

Based on our review of documents and the witness interviews that we conducted, we do not believe that Councilmember Wallace violated any provision of applicable law by advocating on the Council for the adoption of the B7 Revised Route while he was simultaneously discussing and negotiating a potential business deal with GNP. We also believe that the relevant facts do not establish that Councilmember Wallace improperly used City resources for the benefit of GNP.

1. Relevant Facts

a. GNP's Interest In The BNSF Corridor

GNP is a Washington corporation originally incorporated in 2006 as Altac Terminals Washington, Inc. The company changed its name to GNP in 2007. GNP's stock is 50% owned by Thomas Payne, GNP's CEO and Chairman, and 50% owned by Douglas Engle, who was, at times relevant to our investigation, GNP's CFO and a GNP director. Thomas Jones, a commuter rail consultant with the Cascadia Center, a transportation think tank, served as a consultant for GNP at times relevant to our investigation.

In around 2003, BNSF Railway Company ("BNSF") announced that it intended to divest itself of the ERC, a railroad line running south from Snohomish to Renton and including a roughly 7-mile spur line from Woodinville to Redmond (the "Redmond Spur"). In a complex series of transactions that ultimately closed in December 2009,

⁷ The City Attorney also noted that Councilmember Wallace's advocacy for the Vision Line on the Council would not violate RCW 42.23.070(1) because the possibility that Sound Transit would ultimately select a particular alignment was likely "too attenuated" to render such advocacy improper. The City Attorney's point that Sound Transit, and not the City of Bellevue, will ultimately decide the final alignment for East Link is a valid one, but we do not consider Sound Transit's role as the final decisionmaker to be dispositive. If the facts established that Councilmember Wallace had advocated or voted on a particular light rail alignment with the specific purpose of benefiting himself or another person, we believe that such conduct could violate RCW 42.23.070(1), even though the City's preferred alignment does not bind Sound Transit.

BNSF conveyed title in the ERC to the Port of Seattle.⁸ In the transactions, BNSF reserved a freight easement in the northern portion of the Corridor, from Woodinville to Snohomish.

Nearly all of the remainder of the Corridor south of Woodinville, along with the Redmond Spur, was “railbanked” under the National Trails System Act, 16 U.S.C. § 1247(d) (the “Trails Act”).⁹ The Trails Act provides a mechanism by which rail corridors that would otherwise be abandoned can be preserved for potential future rail use and converted into interim trails for recreational and other uses if the abandoning railway and a “trail sponsor” (in this case, King County) enter into an interim trail use agreement. Under the statute, however, interim trail use of a railbanked corridor may be terminated if the railway requests the restoration of freight rail service on the railbanked corridor.

Beginning no later than 2008, GNP expressed an interest in offering freight, commuter, and excursion rail services on the BNSF Corridor. In late summer 2008, GNP responded to a request for quotations issued by BNSF to provide freight rail services on the northern portion of the corridor, from Woodinville north to Snohomish. GNP was selected as the third-party freight operator on that segment in September 2008. GNP was granted a freight easement, and, in December 2009, GNP entered into an Operations and Maintenance agreement and a Railroad Right of Way License with the Port of Seattle. Those agreements authorized GNP to provide freight and excursion service over the northern portion of the Corridor, from Woodinville to Snohomish. GNP then contracted with Ballard Terminal Railroad Company, LLC to actually conduct freight service on the northern portion of the BNSF Corridor, and GNP thereafter began to provide low-volume freight service along the northern section of the Corridor.

GNP also expressed an interest in the railbanked portions of the Corridor, and about the possibility of reactivating those portions of the Corridor and running freight, commuter, and excursion trains on those portions. In business plans and other documents we reviewed pertaining to GNP, as well as in various public statements, GNP frequently referred to its intention to provide freight, commuter, and/or excursion rail services on various other portions of the Corridor. The evidence we reviewed shows that GNP contemplated the potential to reactivate service over the Corridor in the near term as far as the northern portion of Bellevue (north of the location of the former Wilburton tunnel) in order to facilitate a possible contract to haul construction spoils from an SR 520 bridge construction project, and to serve other potential customers in the vicinity of the Bellevue-Redmond Road. The GNP witnesses we spoke to all stated that GNP did not have any concrete, near-term plans to seek to reactivate the Corridor south of downtown Bellevue, and that any such plans would have been a decade or more out, in part because the destruction and abandonment of the Corridor at the former Wilburton tunnel and the

⁸ The City of Redmond subsequently purchased a roughly 4-mile segment of the Redmond Spur from the Port.

⁹ There is a short gap in the southern, railbanked portion of the corridor through Bellevue, where the former Wilburton tunnel crossed Interstate 405. The Wilburton tunnel was removed during an expansion of the highway. A short segment of the line at the location of the former Wilburton tunnel was deemed abandoned and was not railbanked.

lack of potential freight customers would pose enormous practical obstacles to reactivation of that portion of the BNSF Corridor.

On August 24, 2010, GNP filed a petition with the Surface Transportation Board (the “STB”) seeking to reactivate freight service along the Redmond Spur portion of the BNSF Corridor. In support of its petition, GNP filed with the STB letters of interest from several businesses, expressing their interest in utilizing freight rail service along the Redmond Spur. GNP also submitted into the public record a verified statement of support from Robert C. Wallace, Councilmember Wallace’s father. Robert Wallace’s verified statement noted that the reactivation of freight rail service along the Redmond Spur would improve the value of properties in Redmond owned by Wallace/Knutsen, L.L.C. (a Wallace-affiliated limited liability company) and managed by Wallace Properties. Robert Wallace also stated that he believed that “the reactivation of the Redmond Spur and the entire rail corridor along the I-405 corridor provides a compelling opportunity to provide a much needed north/south alternative to the freeways for both freight and commuters.”

GNP’s petition to reactivate freight service along the Redmond Spur presented to the STB what GNP stated was an issue of first impression — whether a freight railroad has the ability to reactivate a rail line that has been railbanked and converted to trail use under the Trails Act where the railroad seeking such reactivation does not possess any property or other rights in the line. GNP’s position was that, notwithstanding the fact that it did not possess the right to operate in or to reactivate freight service on the Redmond Spur, the STB was nevertheless required to grant its application, remove the Redmond Spur from the railbank, and permit GNP to reinstitute freight service on the Redmond Spur.

A substantial number of parties, including BNSF, the Port of Seattle, King County, and Sound Transit, submitted comments to the STB concerning GNP’s petition to reactivate the Redmond Spur. Several of those parties asserted, among other things, that GNP could not reactivate the Redmond Spur unless it first acquired the required property rights to access and operate in the Corridor. The City of Bellevue did not submit substantive comments to the STB concerning GNP’s petition to reactivate the Redmond Spur, but it did join with the cities of Kirkland, Redmond, and Renton in a September 13, 2010 letter asking that the STB closely scrutinize GNP’s application and provide a full opportunity for public comment. The members of the Council were provided with an opportunity to comment on or object to the proposal for the Bellevue City Manager to join the September 13, 2010 letter on behalf of the City, which appears to be contrary to GNP’s interests, but neither Councilmember Wallace nor any other member of the Council made any comment or objection.

In January 2011, there was a significant breakdown in the relationship between GNP’s two shareholders, Messrs. Engle and Payne, driven largely by issues relating to GNP’s poor financial position. In late January, Mr. Engle proposed that the company either file for bankruptcy or that Mr. Engle take over as CEO. In response, Mr. Payne purported to terminate Mr. Engle’s employment as CFO and to remove him from the

board of directors. On February 2, 2011, Mr. Engle and other creditors of GNP filed an involuntary bankruptcy petition against GNP in the United States Bankruptcy Court for the Western District of Washington. That proceeding remains pending.

On June 15, 2011, the STB denied GNP's petition to reactivate the Redmond Spur. The STB determined that GNP had not shown that it was a bona fide petitioner to reactivate service on the line because it had not shown that it had the financial ability to reactivate service. The STB noted that GNP was insolvent and that it had not demonstrated how it would overcome a number of physical and financial obstacles to the successful reactivation of freight service on the Redmond Spur. Because it ruled that GNP was not financially capable of reactivating service, the STB did not expressly address the question of whether GNP could reactivate the Redmond Spur even though it did not possess any property rights in the line, or, if it could, the scope of the rights that GNP would have in the line after reactivation.

b. Councilmember Wallace's Relationship With GNP

Councilmember Wallace first met Mr. Engle, GNP's CFO, in around November 2009,¹⁰ and he appears to have had at least general discussions about rail in the BNSF corridor with GNP by January 2010. On January 8, 2010, Councilmember Wallace sent Bellevue City Manager Steve Sarkozy an email stating that "Doug Engle from GNP Railway tells me Sound Transit has *grossly* overestimated the costs of running the train on the vacant rail corridor, and I would think he is in a position to know."

Councilmember Wallace does not appear to have discussed any potential business deals with GNP until around June 2010. At that time, GNP approached Councilmember Wallace about negotiating a lease for a small railroad spur on a piece of commercial property in Redmond owned by Wallace/Knutsen, L.L.C. (the "Wallace Spur"). GNP ultimately executed a lease for the Wallace Spur with Wallace/Knutsen, L.L.C., on or about July 26, 2010.

In late June 2010, during the negotiations for the lease of the Wallace Spur, Councilmember Wallace and GNP also began to explore, on a general level, other potential common business interests. Those discussions gradually became more focused, and in about September 2010, GNP and Councilmember Wallace began discussing a business relationship under which Wallace Properties Development Company would invest in and perform real estate development services for GNP. Beginning in early October 2010, Councilmember Wallace and GNP began negotiating drafts of a

¹⁰ On November 18, 2009, Mr. Engle sent Councilmember Wallace an email stating:

It was a pleasure getting to meet you last night at the Eastside Rail Now! Meeting. The circumstances seem to indicate that we should get together and discuss the East Link and Eastside Rail Corridor further. It might help to recognize GNP as a private business concern with expertise in rail who has access to low interest federal loans and a friendly attitude toward our Eastside home. We are not a replacement of Sound Transit, but a rail operator as BNSF and Amtrak are for Sounder today – *complementary*.

Memorandum of Understanding (“MOU”) to set out the structure of the parties’ potential deal.¹¹ The stated purpose of the MOU was for the “creation and financing of a limited liability company for the purpose of operating a railway on the Eastside Rail Corridor specifically and generally for operating railways in the Pacific Northwest.” The focus of the MOU is on portions of the rail corridor outside of Bellevue (specifically, portions of the line running from Snohomish to Woodinville, as well as the Redmond Spur), but the MOU does state that “GNP as an authorized common carrier has the ability, with approval from the Surface Transportation Board, to remove the remainder of the ERC from railbank status and commence rail operations thereon. At such time it will hold common carrier freight rights over those portions of the ERC as well.”

The issue of potential conflicts of interest surfaced several times during Councilmember Wallace’s negotiations with GNP. The agenda for a September 14, 2010 meeting between GNP and Wallace Properties included as an agenda item a discussion of potential conflicts of interest for Councilmember Wallace. In addition, in emails to Councilmember Wallace dated September 17, 2010 and November 21, 2010, Robert Wallace emphasized the need to avoid potential conflicts of interest with respect to Councilmember Wallace’s position on the Council. These materials were not specific about the nature of any potential conflict of interest. Tom Jones, GNP’s consultant, stated during our interview of him that he was aware of only the potential for an appearance of a conflict of interest based on Councilmember Wallace’s elected office, rather than any actual conflict of interest. Councilmember Wallace also expressed the view that the concern, if any, was about the appearance of a conflict, rather than any actual conflict.

GNP was eager to get the MOU executed as soon as possible, and GNP informed Councilmember Wallace that it needed to file the executed MOU with the STB in support of its application to reactivate freight service on the Redmond Spur no later than December 15, 2010. The final version of the MOU was executed on December 14, 2010.¹² It appears that GNP was eager to obtain an executed MOU to aid it with its application to the STB, because the MOU tended to support GNP’s claim that it would be financially able to operate rail service on the Redmond Spur.

As executed, the MOU contemplated an initial capital contribution by Wallace Properties Development Company of \$500,000 in exchange for an equity interest as part of a \$30 million round of investment by other investors. The MOU further contemplated that Wallace Properties Development Company would provide real estate development services for GNP for a fee. The MOU expressly stated that the investment terms

¹¹ Around this same time, GNP and Councilmember Wallace also had some tentative discussions about a potential GNP proposal under which either GNP or the Cascade Land Conservancy would attempt to acquire the fee interest in the BNSF Corridor from the Port of Seattle. Those discussions do not appear to have advanced beyond a very early stage.

¹² During the negotiation of, and immediately after the execution of, the MOU, GNP several times requested that Wallace Properties advance it funds to pay creditors. On each such occasion, Wallace Properties declined to advance funds to GNP.

contained in the MOU were not binding commitments, but that the parties would make commercially reasonable efforts to perform their commitments under the MOU.

As noted above, the executed MOU also expressly provided that the obligations of Councilmember Wallace and the Wallace-affiliated entities were contingent upon Councilmember Wallace obtaining a legal opinion regarding whether anything in the agreement posed a conflict of interest with respect to his position on the Council:

Upon execution of this MOU, Kevin Wallace shall obtain a legal review of its terms to determine whether any conflicts of interest exist between his position on the Bellevue City Council and the performance of the obligations herein. Any obligations of Kevin Wallace, Robert C. Wallace or any of the Wallace entities are expressly subject to receipt of a legal analysis concluding that they do not pose a conflict of interest.

In our interview with Councilmember Wallace, he stated that the potential business deal with GNP was not sufficiently far along by December 2010 that he felt comfortable entering into any kind of binding agreement, and that there were a lot of issues, including the conflicts issue, that remained outstanding. Councilmember Wallace explained to us that he typically would not have signed anything at that point, but because GNP needed to file the MOU with the STB in December 2010 to support its petition to reactivate freight service on the Redmond Spur, he was willing to enter into the MOU because it was not binding and was expressly conditioned on a favorable resolution of the conflicts issue. Councilmember Wallace said that the conflict of interest provision was included in the MOU to allow any potential conflicts issues to be carefully thought through before any Wallace entity incurred binding obligations to GNP.

GNP filed the MOU with the STB on December 15, 2010. GNP asked that the MOU be treated as “highly confidential” and not made available to the public. In filings with the STB, GNP asserted that confidentiality was required for both the MOU itself and the identities of the parties to the MOU because the MOU contained “sensitive, highly confidential commercial information the public disclosure of which would gravely harm the signatories, in that it would disclose their confidential business relationship to parties against whom they have or may potentially have adverse business interests.”

Councilmember Wallace and the other witnesses we interviewed uniformly said that the idea to seek “highly confidential” treatment for the MOU before the STB was GNP’s, not Councilmember Wallace’s. Messrs. Engle and Payne told us that GNP wanted the MOU to be treated as highly confidential because disclosure would make sensitive information about GNP’s business plan and its potential investors available to potential competitors of GNP, and because the deal was still at a preliminary, non-binding stage. Councilmember Wallace acknowledged that because the deal was still at a very early stage when the MOU was filed with the STB, he would not have executed the MOU had GNP not informed him that it would be filed confidentially with the STB.

Section I of the GNP-Wallace MOU contains a detailed list of potential sources of revenue for GNP, including, among other things, offering common carrier freight service, excursion service, and commuter rail service, as well as tariff charges from any other freight or passenger rail service contemplated on GNP's rail line. Section I.d also states that GNP's contemplated revenue sources would include revenue from the grant of "sub-easements" for other uses of the BNSF Corridor from various entities, including Sound Transit:

d. Sub-easements for use of the rail corridor.

A number of other parties are interested in using the ERC (e.g., Cascade Water Alliance, Puget Sound Energy, Sound Transit). GNP may obtain revenue from these entities for granting sub-easements or licenses to use the corridor.

A near identical provision was contained in an early, October 2, 2010 draft of the MOU sent by Councilmember Wallace to Mr. Engle, but that included an additional annotation:

d. Sub-easements for use of the rail corridor. A number of other parties are interested in using the ERC (e.g., Cascade Water Alliance, Puget Sound Energy, Sound Transit). GNP may obtain revenue from these entities for granting sub-easements or licenses to use the corridor. *[The ability to do this is in question. It depends upon what GNP can do as a "common carrier freight" operator that is not the fee owner. If GNP bought the fee from the Port their [sic] would be no question GNP could sub-license.]*

The potential business relationship contemplated by the MOU was short-lived. Upon learning of the internal disputes at GNP in January 2011, Councilmember Wallace instructed the other parties to stop work on the potential GNP-Wallace deal. The MOU was eventually formally terminated in writing on March 9, 2011. The GNP lease of the Wallace Spur was terminated in writing on June 6, 2011.

Councilmember Wallace did not obtain the legal review contemplated by the MOU of the conflict of interest issues potentially presented by his relationship with GNP. Councilmember Wallace stated to us that he had contacted Bellevue attorney Charles A. Klinge about getting an opinion on the conflicts issue, but that he and Mr. Klinge did not get the opportunity to meet and discuss the issue before they stopped work on the GNP deal in late January. Contemporaneous documents produced to us by Councilmember Wallace support Councilmember Wallace's statements that he intended to seek a legal analysis of the conflicts issues from Mr. Klinge before consummating any deal with GNP.

Councilmember Wallace informed us that he does not believe that his dealings with GNP at any point gave rise to a conflict of interest with his position as a member of

the Bellevue City Council. Councilmember Wallace stated that the potential deal between Wallace Properties and GNP was focused on providing freight service on the Redmond Spur and the northern portion of the BNSF Corridor, and not on any use of the BNSF Corridor in Bellevue. Councilmember Wallace acknowledged that there was some discussion about the business opportunity to transport spoils away from the Route 520 construction project well north of the former Wilburton tunnel. Councilmember Wallace further emphasized that the GNP MOU was nonbinding and was expressly contingent on his receipt of a legal opinion concerning potential conflicts of interest, and he stated that he absolutely would have obtained a conflicts opinion before engaging in any business with GNP that touched the City of Bellevue.

c. **Councilmember Wallace's Advocacy For The B7 And B7 Revised Alignments**

Since well before he ran for and was elected to the Bellevue City Council (and before he was introduced to GNP), Councilmember Wallace consistently advocated some variation of the B7 alignment for East Link light rail south of downtown Bellevue. The B7 alignments that Councilmember Wallace has supported would all utilize some portion of the BNSF Corridor along I-405 between I-90 and downtown Bellevue.

Councilmember Wallace also played a leading role in advocating further study of the proposed B7 Revised alignment by the City of Bellevue. In summer 2010, after the City received the results of several studies it had commissioned of Sound Transit's DEIS, Councilmember Wallace and Mayor Davidson explored how the City could show that the B7 alignment in Bellevue could work and could produce comparable ridership to Sound Transit's preferred alignment at a lower cost. In the course of that process, they began speaking with William Popp, Sr., a transportation consultant who had made public comments before the Council about Sound Transit's preferred alignment. Mr. Popp worked with Councilmember Wallace and Mayor Davidson on the initial proposal for study of what came to be known as the B7 Revised alignment. Mr. Popp submitted the proposal to Councilmember Wallace and Mayor Davidson on September 9, 2010, and portions of Mr. Popp's proposal were included in materials presented to the Council for consideration at the Council's September 13, 2010 meeting.

One item in the scope of work for Mr. Popp's September 9, 2010 proposal specifically referenced GNP. Item 7 for phase one of the scope of work in the Popp proposal called for the consultant to "[d]iscuss freight rail usage of the Base Alignment with GNP Rly LLC to ensure that the design concept accommodates the common carrier requirement for this corridor." During our interview with him, Mr. Popp was unable to clearly explain the meaning of that item of the scope of work. Mr. Popp stated that he believed that item of the scope of work was either drafted by Councilmember Wallace or was drafted by Mr. Popp based on language provided by Councilmember Wallace. In our interview with Councilmember Wallace, he stated that he believed Mr. Popp had included a general reference in the scope of work to consulting with a freight operator, and that Councilmember Wallace had then suggested referencing GNP, because he thought it would be logical to name the company that had actually expressed an interest

in acting as a freight operator on the Corridor. Councilmember Wallace stated that the purpose for that item being included in the Popp proposal was to make sure that any potential future freight use of the Corridor (in the event that freight service was reactivated on the Corridor and the Corridor was removed from railbanked status) would not pose an obstacle to utilizing the BNSF Corridor for light rail under the B7 alignment (*i.e.*, to make sure that reactivation of the Corridor for freight use would not preclude other uses, like light rail).

Several months earlier, after a Council discussion concerning the City's BNSF Interest Statement, Councilmember Wallace had also made a similar request of City staff. In a July 1, 2010 email string, Councilmember Wallace requested that City staff provide him with information on the ownership of fee title in, and encumbrances on, the BNSF Corridor through Bellevue, as well as on questions concerning what rights a freight rail operator would have if freight service was reactivated in the Corridor. As with the work item concerning the status of the BNSF Corridor included in the Popp proposal, Councilmember Wallace told us that he requested that information in order to be able to confirm that potential future freight use would not preclude all other uses of the Corridor, so as to be an obstacle to the use of the Corridor for light rail. Councilmember Wallace said that he did not request that information in order to advance his relationship with GNP or to benefit GNP in any way. He stated that he does not recall ever having any conversations with Messrs. Engle or Payne of GNP about the City's study of the B7 Revised alignment.

After the September 13, 2010 Council meeting, City staff developed its own scope of work for further study of the B7 Revised route. The scope of work developed by City staff did include a work item concerning a legal analysis of the legal status of the BNSF Corridor, but it did not expressly reference GNP. The stated reason for staff's inclusion of that work item was to determine whether the B7 Revised alignment, which was at that time designed to occupy the center of the BNSF Corridor in order to reduce construction costs, would be compatible with the possibility of future freight rail on the BNSF Corridor.

City staff then issued a request for proposals, and staff ultimately selected ARUP North America to enter into an approximately \$670,000 contract for study of the B7 Revised alignment. On December 6, 2010, the Council approved the contract with ARUP by a vote of 4-3, with Councilmember Wallace voting in favor.

2. Legal Analysis And Conclusions

Because the facts that we are aware of surrounding Councilmember Wallace's relationship with GNP do not implicate an interest in any City contract or involve improper compensation or improper use or disclosure of confidential information, the focus of our analysis concerning Councilmember Wallace's business dealings with GNP is again on whether the evidence shows that Councilmember Wallace violated RCW 42.23.070(1) by using his position on the Council to attempt to secure any special privilege or exemption for himself, GNP, or another person.

Our analysis of Councilmember Wallace's involvement with GNP focuses on two, related issues: (1) whether Councilmember Wallace violated RCW 42.23.070(1) by negotiating a potential business deal with GNP, an entity with a stated interest in reactivating freight and other rail service along the BNSF Corridor, while he was advocating on the Council for East Link light rail alignments that utilize a portion of the BNSF Corridor; and (2) whether Councilmember Wallace used or attempted to use City resources for the private benefit of GNP.

a. **Councilmember Wallace Did Not Violate RCW 42.23.070(1) In Connection With Negotiating A Potential Business Deal With GNP.**

As we have previously explained, we believe that Councilmember Wallace could be found to have violated RCW 42.23.070(1) with respect to his potential business relationship with GNP only if the facts show that Councilmember Wallace took some action in his official position with the intention of securing a special privilege or exemption for himself, GNP, or some other person. In our view, it is not sufficient, to find a violation of section 42.23.070(1), that some interest of Councilmember Wallace could be impacted or affected by his actions as a member of the Council, or that his business relationship with GNP and his advocacy for the B7 alignment both involved the ERC in some fashion.

The primary allegation that has been made against Councilmember Wallace in this respect is that Councilmember Wallace's continued support for and advocacy of, the B7 and B7 Revised alignments, including his advocacy of, and votes in favor of, the \$670,000 ARUP study of the B7 Revised alignment, violates RCW 42.23.070(1) because of GNP's private interests in or designs on the Corridor. A number of facts identified during our investigation support Councilmember Wallace's assertions that none of his actions on the Council in support of the B7 or B7 Revised alignments was taken for the purpose of benefiting GNP's interests or his own private interests.

First, as we have noted above, Councilmember Wallace has advocated for the use of a B7 alignment that utilizes the BNSF Corridor since long before he was elected to the Council and long before he had any involvement with GNP, which tends to suggest that Councilmember Wallace's continued attempts to advance a B7 alignment, including his support for the ARUP study, were not done with the purpose of advancing GNP's or his own private interests.

Second, although the MOU was not expressly limited to operations on the Redmond Spur and the northern portion of the BNSF Corridor, the documents we reviewed and the statements of the other witnesses we interviewed were all generally consistent with Councilmember Wallace's statements that the primary focus of the MOU was on freight service in the northern portion of the Corridor.

Third, Councilmember Wallace and the other witnesses we interviewed uniformly stated that they did not believe that Sound Transit's use of the B7 alignment involving the BNSF Corridor would result in any actual benefit to GNP or its operations.

Fourth, the obligations of Councilmember Wallace and the other Wallace parties under the MOU were expressly contingent on Councilmember Wallace's receipt of a legal opinion regarding whether his involvement with GNP created a conflict of interest with respect to his duties on the Council. Although certainly not dispositive of whether any conflict existed, that provision is relevant to our analysis insofar as it tends to indicate that Councilmember Wallace acted in good faith and did not believe he was engaged in attempting to use his position on the Council to advance GNP's interests or his own private interests.

Notwithstanding the above, at least one provision of the December 2010 MOU indicates that GNP may have believed that if GNP was successful in reactivating the BNSF Corridor, it might be able to then collect revenue from Sound Transit for allowing Sound Transit to use portions of the Corridor, including in connection with a B7 alignment. We have looked at this issue closely because the possibility that GNP could receive a financial benefit from Sound Transit's use of the Corridor if it adopted B7 as the final alignment does raise a question under RCW 42.23.070(1). Section I.d of the MOU stated that a potential revenue source for GNP was the collection of revenues for granting sub-easements or licenses to other entities interested in using portions of the BNSF Corridor, and it expressly listed Sound Transit as one such entity. If GNP did, in fact, expect to receive revenue from Sound Transit for any Sound Transit use of the BNSF Corridor in connection with the East Link project, that could give rise to at least some inference that Councilmember Wallace may have intended that GNP would benefit from his actions on the Council in favor of the B7 alignment (such as his vote to advance the ARUP study of the B7 Revised alignment). As we explain below, however, we have seen no evidence actually showing that GNP realistically stood to gain a financial or other benefit from a selection by Sound Transit of the B7 alignment as the final alignment for the East Link project, or that Councilmember Wallace used his position to attempt to secure such a benefit.¹³

The witnesses we interviewed suggested to us that Section I.d of the MOU was intended to refer to the possibility that Sound Transit might someday pay GNP to operate for it some kind of north-south commuter rail on the BNSF Corridor, or that GNP could collect a tariff for any use of GNP's freight rail line by other parties, including Sound Transit. Those witnesses specifically stated that Section I.d of the MOU did not refer to a possibility that Sound Transit would pay GNP to use the Corridor for light rail. In addition, both Mr. Payne and Councilmember Wallace indicated that list of entities in Section I.d from which GNP contemplated potentially obtaining revenue was really just a reference to all of the parties who expressed interest in using the Corridor in a November

¹³ We recognize that Sound Transit, and not the City of Bellevue, will make the decision concerning the final alignment for the East Link project. But, as noted above, we do not believe the fact that the City of Bellevue does not have final decisionmaking authority for the alignment of the East Link project is dispositive of whether Councilmember Wallace could have violated RCW 42.23.070(1). *See* n.7, *supra*.

2009 Memorandum of Understanding concerning potential uses of the Corridor. Councilmember Wallace also stated that the section of the MOU about potential revenue sources was simply an attempt to list every conceivable source of revenue, without regard to what was realistic or even possible. Councilmember Wallace further stated that he does not recall much discussion about Section I.d of the MOU specifically, and that he never had any discussions that involved the possibility of Sound Transit paying any sort of rent to GNP based on the operation of East Link light rail on the BNSF Corridor.

Based on our review of the MOU and the other evidence available to us, we believe Section I.d of the MOU indicates that GNP may have at least considered whether it might someday be able to, in essence, charge Sound Transit rent for any contemplated Sound Transit uses of the corridor, including the East Link light rail project. The reference to potentially collecting sub-easement revenue from Sound Transit does not appear to have been intended to refer to the collection of tariffs for the use of GNP's freight track, as Messrs. Payne and Jones suggested, since the possibility of collecting tariff revenue from non-GNP commuter rail operators is already noted in a different subsection of the MOU, Section I.b. Nor does the language appear intended to refer to revenue for operating a future north-south commuter rail, as Mr. Engle suggested, because Section I.d contemplates the grant only of property rights (*i.e.*, licenses or sub-easements) to use the Corridor, not revenue from any kind of operating arrangement for commuter rail. In addition, Mr. Payne's statement that the parties listed in Section I.d were all parties to the November 2009 Memorandum of Understanding concerning the Corridor further suggests that Section I.d contemplated GNP potentially obtaining revenue for Sound Transit's use of the Corridor for the East Link project, because the November 2009 Memorandum of Understanding among the Port of Seattle, Sound Transit, King County, the City of Redmond, the Cascade Water Alliance, and Puget Sound Energy expressly notes that Sound Transit's interest in the Corridor relates to proposed alignments for the East Link project.

That said, any desire by GNP to collect revenue from Sound Transit based on Sound Transit's use of portions of the BNSF Corridor in connection with the East Link project was likely wholly aspirational at best, and more likely an impossibility. Both Messrs. Engle and Payne stated that they did not believe that GNP could have ever been in a position to collect rent from Sound Transit based on its use of the Corridor for East Link. In addition, as the early draft of the MOU quoted above acknowledged, GNP's ability to obtain revenue by granting sub-easements for the use of the BNSF Corridor to other entities would depend on what rights GNP possessed in the Corridor. At the time the MOU was executed, GNP's only extant rights in the BNSF Corridor were to provide freight and excursion service over the northern portion of the Corridor and a very limited portion of the Redmond Spur, and even if GNP succeeded in reactivating the entire BNSF Corridor, including in Bellevue, we have seen nothing to suggest that GNP believed that it would acquire sufficient property rights in the Corridor such that it could require other parties with an interest in the Corridor to obtain sub-easements for those uses from GNP.

As a preliminary matter, it is unsettled whether GNP could even reactivate freight service over the remainder of the BNSF Corridor without first negotiating for and obtaining the right to reactivate freight service on the remainder of the Corridor from King County (which had already acquired that right from BNSF). In the STB proceeding involving GNP's petition to reactivate freight service on the Redmond Spur, several parties argued that the STB cannot grant a railroad's petition to reactivate freight service on a railbanked corridor unless the railroad has already contractually acquired the right to reactivate service from the abandoning railroad or its successor. The STB's June 15, 2011 decision denying GNP's petition to reactivate the Redmond Spur did not resolve that disputed question. If the parties who opposed GNP's petition to reactivate the Redmond Spur are correct, however, then GNP would have had to negotiate for (and pay for) any property rights that it wanted to acquire in the BNSF Corridor, and, it seems doubtful that any such negotiated transaction would have resulted in GNP acquiring the rights to control other uses of the Corridor and to charge other users for sub-easements.

Even if GNP could reactivate freight service over the Redmond Spur and other portions of the Corridor without actually possessing any underlying property rights in the Corridor, there would still be substantial, and likely insurmountable, obstacles to any GNP attempt to charge Sound Transit for the use of the Corridor for the East Link project. First, it is far from clear that any right of reactivation granted by the STB would confer upon GNP sufficient rights to control, or charge for, other uses of the Corridor, at least insofar as those uses were not inconsistent with or interfering with the proposed freight use. Second, before it could even apply to reactivate freight service over the portion of the Corridor that would be utilized for the B7 alignment, GNP would have to both show that it was in a position to restore active freight service over that portion of the line (which Mr. Payne stated would be very difficult to do because there are not currently any potential freight customers in that area) and somehow reconnect the abandoned section of the Corridor at the site of the former Wilburton tunnel. Third, in designing potential East Link alignments involving use of the BNSF Corridor (in both the B and C sections), Sound Transit expressly contemplated the potential for future freight rail use and designed the alignments to accommodate any such future use, thus further reducing the likelihood that Sound Transit would be forced to pay GNP for use of the Corridor. That is, it appears that Sound Transit designed for potential future freight use on the Corridor in both the B and C segments to avoid future interference with freight rail and in recognition of the railbanked status of the Corridor, making it highly unlikely that any future freight rail operator could extract payments from Sound Transit.

In sum, we do not believe, and we have seen nothing to suggest, that there is any significant possibility that Sound Transit would be required to pay GNP for a sub-easement or license to use the BNSF Corridor for the East Link light rail project. We have also not seen anything to indicate that a Sound Transit decision to select an East Link light rail alignment utilizing the BNSF Corridor in Bellevue would result in any other realistic benefit to GNP. Although one could conceive of future hypothetical situations in which GNP might at some indefinite point in the far off future benefit in some way from Sound Transit's decisions about the East Link project alignment, such speculative and remote scenarios are too attenuated to shed any light on the relevant

question of whether Councilmember Wallace's actions on the Council in 2010 ran afoul of RCW 42.23.070(1) by intending to confer a special privilege or exemption on himself. Thus, it may be possible to conjure up hypothetical scenarios where a freight operator that acquired common carrier rights over a portion of the Corridor also utilized by Sound Transit light rail might profit from the presence of light rail, but the evidence we have reviewed and witnesses we have interviewed lend no credibility to the proposition that any such hypothetical scenarios motivated Councilmember Wallace or that he thereby intended to confer a special privilege or exemption on himself or GNP. Accordingly, we conclude, based on the evidence available to us, that Councilmember Wallace did not violate RCW 42.23.070(1) through his dealings with GNP and his advocacy for the use or study of the B7 or B7 Revised alignments.

b. Councilmember Wallace Did Not Use Or Attempt To Use City Resources To Benefit GNP.

Finally, we consider the related issue of whether there is any evidence that Councilmember Wallace ever improperly used or attempted to use City resources for GNP's benefit. With respect to this issue, our investigation focused on whether either Councilmember Wallace's July 1, 2010 request for information concerning the title to and legal status of the BNSF Corridor through Bellevue or the proposed consideration of freight rail usage of the Corridor included in William Popp's September 9, 2010 proposal for further study of the BNSF Corridor was intended for the benefit of GNP.

As we noted above, Councilmember Wallace stated that the reason for both of his inquiries into the status of the BNSF Corridor was to determine whether the possibility of future freight rail service on the Corridor could preclude other uses of the Corridor. Councilmember Wallace said that he believed it was important for the City to be prepared with answers concerning the legal status of the BNSF Corridor in the event that Sound Transit claimed that the railbanked status of the Corridor made the a B7 alignment infeasible. Councilmember Wallace said that he did not request information on the status of the BNSF Corridor to advance in any way his relationship with GNP.

Statements made by Messrs. Engle and Payne during our interviews with them are consistent with Councilmember Wallace's statements. Both Mr. Engle and Mr. Payne stated that GNP never received any information that had been prepared or gathered by City staff and that they never had any discussions with Councilmember Wallace about how any study by the City of Bellevue could or would benefit GNP. Councilmember Wallace's stated reasons for requesting information about the status of the BNSF Corridor are also nearly identical to the reasons offered by City staff for including a work item about the legal status of the Corridor in the scope of work for the ARUP study. Moreover, given the fact that GNP had hired railroad counsel in Washington, D.C. and was actively proceeding with its application to reactivate freight service on the Redmond Spur, it seems very unlikely that Councilmember Wallace would seek information about the legal status of the Corridor from City staff for GNP's benefit, or that GNP would need such information. Moreover, we are not aware of anything about the nature of the information requested by Councilmember Wallace from City staff or the provision

regarding freight rail in the proposed scope of work from Mr. Popp that would lead us to conclude that Councilmember Wallace was seeking information unrelated to City business or that could only have related to GNP's business.

In sum, we do not believe that there is any evidence to show that Councilmember Wallace attempted to use City resources for the benefit of GNP.

V. Conclusion

Based on our investigation and our analysis set forth in this Report, it is our opinion that Councilmember Wallace has not violated any applicable provision of law relating to conflicts of interest in connection with his actions on the Bellevue City Council concerning Sound Transit's East Link light rail project.